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October 7, 2003
DECISION AND ORDER
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Case Name: Personnel Security Hearing

Date of Filing: May 6, 2003

Case Number: TSO-0046

This Decision concerns the eligibility of XXXXXXXXXXXX (hereinafter referred to as "the individual") to hold an access authorization under the regulations set forth at 10 C.F.R. Part 710, entitled "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material."^{1/} A Department of Energy (DOE) Operations Office tentatively denied the individual's request for an access authorization under the provisions of Part 710. This Decision considers whether, on the basis of the evidence and testimony presented in this proceeding, the individual's access authorization should be granted. As set forth in this Decision, I have determined that the individual's request for a security clearance should be denied.

I. Background

The provisions of 10 C.F.R. Part 710 govern the eligibility of individuals who are employed by or are applicants for employment with DOE, contractors, agents, DOE access permittees, and other persons designated by the Secretary of Energy for access to classified matter or special nuclear material. Part 710 generally provides that "[t]he decision as to access authorization is a comprehensive, common-sense judgment, made after consideration of all relevant information, favorable and unfavorable, as to whether the granting or continuation of access authorization will not endanger the common defense and security and is clearly consistent with the national interest." 10 C.F.R. § 710.7(a).

^{1/} An access authorization is an administrative determination that an individual is eligible for access to classified matter or special nuclear material. 10 C.F.R. § 710.5. Such authorization will be referred to variously in this Decision as an access authorization or security clearance.

In this instance, the individual requested a security clearance from DOE after gaining employment with a DOE contractor. However, the local DOE security office (DOE Security) initiated formal administrative review proceedings by informing the individual that his access authorization was being denied pending the resolution of certain derogatory information that created substantial doubt regarding his eligibility. This derogatory information is described in a Notification Letter issued to the individual on January 16, 2003, and falls within the purview of potentially disqualifying criteria set forth in the security regulations at 10 C.F.R. § 710.8, subsections f, k and l. More specifically, Enclosure 2 attached to the Notification Letter (Enclosure 2) alleges that the individual: 1) “deliberately misrepresented, falsified, or omitted significant information from a Questionnaire for National Security Positions [and during] a personnel security interview . . . on a matter relevant to a determination regarding eligibility for DOE access authorization,” 2) “trafficked in, possessed, used, manufactured, or experimented with a drug or other substance listed in the Schedule of Controlled Substances,” and 3) “engaged in unusual conduct . . . which tends to show that [he] is not honest, reliable, or trustworthy, or which furnishes reason to believe that [he] may be subject to pressure, coercion, exploitation, or duress which may cause [him] to act contrary to the best interests of the national security.” 10 C.F.R. §§ 710.8(f), (k) and (l) (Criterion F, Criterion K and Criterion L, respectively). The bases for these findings are summarized below.

Citing Criterion F, Enclosure 2 states that the individual intentionally falsified information he provided on a Questionnaire for National Security Positions (QNSP) that he signed in January 2002, when he answered “No” in response to questions concerning his previous use, purchase and manufacture of illegal drugs. In addition, Enclosure 2 states that in April 2002, the individual lied about his illegal drug use to an investigator conducting a background investigation into the individual’s suitability to hold a security clearance. Under Criterion K, Enclosure 2 indicates that during a Personnel Security Interview (PSI) conducted with the individual on September 18, 2002, the individual admitted several matters regarding his previous drug involvement, including that he used marijuana extensively between 1993 and 2001 while attending undergraduate and graduate schools and that he used illegal mushrooms on four occasions during the same time period. Finally, citing Criterion L, Enclosure 2 states that in the same PSI, the individual admitted that while employed by the DOE contractor, he purchased and used marijuana at his residence on one occasion in January 2002, knowing that it was strictly against the policy of the DOE contractor for him to be involved with illegal drugs.

In a letter received by the DOE Office of Hearings and Appeals (OHA) on May 6, 2003, the individual exercised his right under Part 710 to request a hearing in this matter. 10 C.F.R. § 710.21(b). On May 8, 2003, I was appointed as Hearing Officer in this case. After conferring with the individual and the appointed DOE Counsel, 10 C.F.R. § 710.24, a hearing date was established. At the hearing, the DOE Counsel called a

DOE Security Analyst as its sole witness. Apart from testifying on his own behalf, the individual called his wife and a co-worker as witnesses. The transcript taken at the hearing will be hereinafter cited as "Tr.". Various documents that were submitted by the DOE Counsel and the individual during this proceeding constitute exhibits to the hearing transcript and will be cited as "Exh.".

Summary of Findings

The following factual summary is essentially uncontroverted. However, I will indicate instances in which there are disparate viewpoints regarding the information presented in the record.

The individual accepted a position with a DOE contractor in September 2001. The individual's employer sought a DOE security clearance for him, which was required for his participation in an upcoming work assignment. Accordingly, the individual completed a Questionnaire for National Security Positions (QNSP) which he signed and dated January 7, 2002. In the QNSP, the individual answered "No" to questions 24a and 24c indicating that he had not used any illegal controlled substance within the last seven years, or since the age of 16, and that he had not been involved in the illegal purchase or manufacturing of any controlled substance. On April 1, 2002, the individual was interviewed during a background investigation conducted by the Office of Personnel Management (OPM). During this interview, the individual represented to the OPM investigator that he had never used any illegal substance in the past.

However, information obtained in the course of the OPM investigation revealed that the individual's representations regarding his prior drug use were false. In particular, a physician at the university attended by the individual informed the OPM investigator that during a medical visit on February 1, 2000, the individual admitted smoking marijuana, usually five pipefuls or a couple of joints with his friends, almost on a daily basis for a period of one year prior to the visit. After receiving this information, DOE Security decided to conduct a PSI with the individual.

In the PSI, conducted on September 18, 2002, the individual readily admitted that he intentionally falsified his responses on the QNSP concerning prior drug use. The individual explained that at the time he filled out the QNSP, he had not yet been provided supplemental paperwork clarifying that past illegal drug use would not automatically disqualify him from holding an access authorization. The individual therefore believed that he would be denied a security clearance and perhaps fired if he disclosed his prior drug use. On the day he actually turned in the QNSP in February 2002, the individual was provided with documentation indicating that prior drug use was not a ground for automatic denial of his security clearance. Nonetheless, the individual states that he felt he could not withdraw and correct his QNSP without arousing suspicion. The individual further asserts that after submitting the false

QNSP, he believed that he had no choice but to maintain his falsehood in April 2002, when asked by the OPM investigator about previous drug use.

The individual has now provided substantial information regarding his prior drug use, both during the PSI and this proceeding. The individual experimented with marijuana only two times in high school. However, the individual's use of marijuana became increasingly more substantial while a college student and during the first years of graduate school. During the 1993/94 school year, the individual estimates that he used marijuana on 5 - 10 occasions, and only on 1- 5 occasions during the 1994/95 school year. During the 1995/96 and 1996/97 school years, the individual had a change of roommates and his marijuana consumption rose to 20-30 occasions, or once a week on average. This trend continued. By his own estimation, the individual's marijuana use rose to 30 occasions during the 1997/98 school year, and to 40 occasions during his 1998/99 school year before peaking during the 1999/2000 school year when he used marijuana almost daily. In addition to his marijuana use, the individual used illegal mushrooms, an hallucinogen, on four separate occasions between 1994 and 1998. In two of those instances, the individual himself grew the mushrooms after acquiring seedlings and instructions from an Internet source.

The individual states that his marijuana use diminished to 15 occasions during the 2000/01 school year, his final year of graduate school. During that time, the individual decided to change roommates and acquired an apartment with a female student who would ultimately become his wife. The individual states that he stopped using marijuana in January 2001 when he began interviewing for employment. According to the individual, he has used marijuana only one time since January 2001. This occurred in January 2002, approximately four months after he moved to his present city of residence and began working for the DOE contractor. On this occasion, an old college friend came to visit the individual. The individual had smoked marijuana with this friend numerous times while in college, and the individual decided to purchase some marijuana to rekindle their friendship. Using an Internet chat room, the individual was able to locate a drug dealer who met and sold the individual a small quantity of marijuana. The individual smoked the marijuana with his friend primarily using a marijuana pipe that he acquired while in school.

In the PSI, the individual admitted that he was well aware of his employer's policy prohibiting the use of any illegal drugs by its employees. The individual further admitted during the PSI that while he had not used marijuana since the incident with his friend in January 2002, he still had possession of the marijuana pipe at his residence. According to the individual, he had no specific intention of using marijuana again but had retained the pipe, which he describes as a "keepsake," in case the occasion arose. Immediately following the PSI, however, the individual went home and threw away the marijuana pipe along with some rolling papers still in his possession. The individual vows that he will never again use marijuana or other illegal drug.

II. Analysis

A DOE administrative review proceeding under 10 C.F.R. Part 710 is not a criminal matter, in which the burden is on the government to prove the defendant guilty beyond a reasonable doubt. *See Personnel Security Hearing*, Case No. VSO-0078, 25 DOE ¶ 82,802 (1996). In this type of case, we are dealing with a different standard designed to protect national security interests. A hearing is "for the purpose of affording the individual an opportunity of supporting his eligibility for access authorization." 10 C.F.R. § 710.21(b)(6). Once DOE Security has made a showing of derogatory information raising security concerns, the burden is on the individual to come forward at the hearing with evidence to convince the DOE that granting or restoring his access authorization "would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.27(d). This standard implies that there is a strong presumption against the granting or restoring of a security clearance. *See Department of Navy v. Egan*, 484 U.S. 518, 531 (1988) ("clearly consistent with the national interest" standard for the granting of security clearances indicates "that security determinations should err, if they must, on the side of denials"); *Dorfmont v. Brown*, 913 F.2d 1399, 1403 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991) (strong presumption against the issuance of a security clearance).

I have thoroughly considered the record of this proceeding, including the submissions of the parties, the evidence presented and the testimony of the witnesses at the hearing convened in this matter. In resolving the question of the individual's eligibility for access authorization, I have been guided by the applicable factors prescribed in 10 C.F.R. § 710.7(c): the nature, extent, and seriousness of the conduct; the circumstances surrounding the conduct, to include knowledgeable participation; the frequency and recency of the conduct; the voluntariness of the participation; the absence or presence of rehabilitation or reformation and other pertinent behavioral changes; the motivation for the conduct; the potential for pressure, coercion, exploitation, or duress; the likelihood of continuance or recurrence; and other relevant and material factors. After due deliberation, it is my opinion that the individual's access authorization should not be granted since I am unable to conclude that such granting would not endanger the common defense and security and would be clearly consistent with the national interest. 10 C.F.R. § 710.27(d). The specific findings that I make in support of this determination are discussed below.

A. Criteria F, Falsification

The individual now freely admits that he intentionally falsified his QNSP in January 2002, and subsequently lied to the OPM investigator in April 2002, in responding to questions concerning his prior use, possession, purchase and manufacture of illegal drugs. Tr. at 81-84. Accordingly, I find that DOE Security properly invoked Criterion F in this case. At the hearing, the DOE Security Analyst

described the basis for DOE Security's concern when an individual intentionally provides false information on a security questionnaire or during security interviews. Such deliberate deception raises serious issues with regard to the individual's honesty, reliability and trustworthiness. Tr. at 68-69. As observed in similar cases, the DOE security program is based on trust, and when a security clearance holder breaches that trust, it is difficult to determine to what extent the individual can be trusted again in the future. *See, e.g., Personnel Security Hearing, Case No. VSO-0013, 25 DOE ¶ 82,752 at 85,515 (1995); Personnel Security Hearing, Case No. VSO-0281, 27 DOE ¶ 82,821 at 85,915 (1999), aff'd, 27 DOE ¶ 83,030 (2000).*

In mitigation of these security concerns, the individual asserts that he lied on his QNSP and to the OPM investigator out of fear of losing his job. Tr. at 78, 85. According to the individual, he agonized over his decision to provide false information in both instances, but thought that he would be denied a security clearance and might be fired if he revealed the extent of his prior drug involvement. The individual further maintains that: 1) the falsifications were isolated incidents of poor judgment and not typical of his character; 2) the falsifications happened more than a year ago when he was transitioning out of a college environment; and 3) since the September 2002 PSI, he has been completely honest to DOE Security and to his employer about his past drug use. Tr. at 82-83, 86-88; Exh. 6 at 1, 3. The individual's wife and co-worker (also a close friend) testified that the individual is generally an honest and trustworthy person. Tr. at 14, 48-49.^{2/} The individual's supervisor has also expressed her support of the individual, noting that the individual has now fully disclosed his prior drug use and falsifications to her and three co-workers. *See Exh. 5.*

Nonetheless, I find that the individual has failed to adequately mitigate the security concerns stemming from the falsification of his QNSP and lying to the OPM investigator. The individual concedes that prior to turning in his QNSP in February 2002, he was made aware that prior drug use was not a ground for automatic denial of a security clearance yet decided to proceed with his falsification. The individual maintains that he agonized over his falsification. However, the individual did not rectify the matter when given an opportunity during the OPM interview in April 2002, but elected to perpetuate his falsehood. The individual did not admit his prior drug involvement until several months later during the September 2002 PSI when it became obvious that his deception had been uncovered. While the individual now openly discusses his prior drug use, there is no indication that the individual would have ever come forward with the truth on his own initiative if he had not been confronted at the PSI. The individual was XX years old when he intentionally falsified

^{2/} The individual's wife further corroborated the individual's account that he wrestled with his decision to falsify his QNSP with regard to his former drug use. Tr. at 23.

his QNSP and lied to the OPM investigator. Thus, I cannot excuse his conduct on the basis of youth.^{3/}

B. Criterion K, Illegal Drug Use; Criterion L, Unusual Conduct

The record of this proceeding establishes that the individual engaged in substantial drug use, principally marijuana, from 1993 to 2001 while a student in college and graduate school. The individual reports that he stopped using marijuana in January 2001 in preparation to begin interviewing for employment, but then had a final episode of marijuana use in January 2002 when a college friend came to visit. On that occasion, the individual sought out, purchased and used the marijuana with the friend although the individual had been working for the DOE contractor for four months and was well aware of his employer's stringent policy prohibiting drug use. The individual did not dispose of his marijuana pipe until after he was confronted with his drug use at the September 2002 PSI.

Thus, I find that Criterion K was rightly applied in this case. As explained by the DOE Security Analyst during the hearing, illegal drug use raises a security concern for the DOE for it reflects a deliberate disregard for state and federal laws prohibiting such use. Tr. at 74. "The drug user puts his own judgment above the requirements of the laws, by picking and choosing which laws he will obey or not obey. It is the further concern of the DOE that the drug abuser might also pick and choose which DOE security regulations he will obey or not obey with respect to protection of classified information." *Personnel Security Hearing*, Case No. VSO-0013, 25 DOE ¶ 82,752 at 85,512 (1995); see *Personnel Security Hearing*, Case No. VSO-0283, 27 DOE ¶ 82,822 (1999). The individual clearly demonstrated poor judgment in January 2002, when he contacted a drug dealer over the Internet and used marijuana, four months after gaining employment with the DOE contractor. In this regard, the DOE Security Analyst observed that the individual might have opened himself to blackmail or other forms of coercion to conceal his use. Tr. at 72-73. On a similar basis, I find that DOE Security properly invoked Criterion L in this case. In my view, the individual's decision to use marijuana in January 2002, while in the process of filing his QNSP, constitutes conduct which tends to show that he is not honest, reliable or trustworthy.

In mitigation of these security concerns, the individual asserts that his last drug use, smoking marijuana with his friend in January 2002, was an isolated incident and prior to that instance he had not used any illegal drugs since January 2001. Tr. at 92; Exh. 6 at 4. The individual points out that while he regularly smoked marijuana in college,

^{3/} The individual contends that the falsifications occurred when "I was transitioning from a college environment to a permanent career . . . [and] I was more naive about things of this nature and more idealistic." Exh. 6 at 3. I find, however, that the individual was of sufficient maturity to grasp the severity of his actions.

his usage steadily declined after his 1999-2000 school year. Tr. at 96-97; see Exh. 7. The individual asserts that he is a much more mature person now, with a wife, career and home, and he no longer associates with former friends who might tempt him to use illegal drugs. Tr. at 113-14, 119.^{4/} According to the individual, “I have different friends, a different environment . . . I wouldn’t do it anymore. It’s not who I am anymore.” Tr. at 120. The individual disposed of his marijuana pipe and associated paraphernalia immediately following the PSI in September 2002. Tr. at 131. At the hearing, the individual appeared to be forthright in expressing his resolve to not use marijuana again.

Notwithstanding, I am unpersuaded that the individual has fully mitigated the security concerns under Criteria K and L, associated with his use of illegal drugs. The individual has failed to negate the negative implications arising from his conduct in choosing to use marijuana in January 2002, contemporaneous with the signing of his QNSP, and then retaining his marijuana pipe and associated paraphernalia apparently for future use until confronted at the September 2002 PSI. The individual’s use of marijuana in January 2002 was apparently induced by the urging of a college friend who was visiting the individual. Nonetheless, it was the individual who made the decision to purchase the marijuana after locating a drug dealer by means of an Internet chat room. Tr. at 111. The individual had been employed for four months and admits that he was well aware of the DOE contractor’s anti-drug policy: “Yeah, it had occurred to me, and I felt some guilt about it, and it didn’t sit well with me . . . -- like, you know, ‘I don’t feel good about this, but I’m not going to sit and struggle with it. I’m just going to try to ignore it.’” Tr. at 111-12.^{5/}

The individual kept the marijuana pipe after his January 2002 usage but maintains that he had no specific intention to use marijuana again. Tr. at 117. According to the individual, “I kept the water pipe use for smoking marijuana as a keepsake and the possibility had existed that I could use it again in the future despite knowing that it was against [my employer’s] policy to use any illegal drugs.” Exh. 6 at 9. The individual attempted to explain during his testimony: “I didn’t have the intentions to secretly defy [the DOE contractor’s] policies. It was that the possibility existed.” Tr. at 116. The distinction drawn by the individual rings hollow. The unavoidable fact is that the individual kept the pipe and other paraphernalia because he remained open to

^{4/} The individual has received e-mail messages from two of these friends during the past two years but states that “I really doubt that I would want either of them to come out and visit me.” Tr. at 119.

^{5/} According to the individual, he “struggled with” falsifying his QNSP, using marijuana in January 2002 and then lying to the OPM investigator, but in each instance he proceeded anyway. Tr. at 112-13. The individual states now that “I can see how I exhibited poor judgment in all of these instances.” Tr. at 113.

using marijuana again if presented with the right circumstances. Thus, I must agree with the assessment of the DOE Security Analyst that there is no indication that the individual would have conclusively stopped using marijuana, as he now claims, had he not been exposed at the PSI. Tr. at 72-73. The individual suggests that he had an epiphany following the PSI: "Although my future involvement with marijuana was unclear at the time, I have since then taken an unmistakable position that marijuana will not be a part of my professional lifestyle." Exh. 6 at 9. However, given the individual's history of substantial marijuana use, his more recent use while employed by the DOE contractor, his efforts to conceal his use and ostensible intention to continue using marijuana prior to the PSI, I find that the individual's assurance falls short of mitigating the aforementioned security concerns under Criteria K and L.

III. Conclusion

As explained in this Decision, I find that DOE Security properly invoked 10 C.F.R. §§ 710.8(f), (k) and (l) in tentatively denying the individual's request for an access authorization. For the reasons I have described above, I find that the individual deliberately falsified information on his QNSP and during a security interview, engaged in the use of illegal drugs and engaged in conduct that tends to show that he is not honest, reliable and trustworthy. I further find that the individual has failed to mitigate the legitimate security concerns stemming from these actions. I am therefore unable to find that granting the individual an access authorization would not endanger the common defense and security and would be consistent with the national interest. Accordingly, I find that the individual's request for an access authorization should be denied. The individual may seek review of this Decision by an Appeal Panel under the regulations set forth at 10 C.F.R. § 710.28.

Fred L. Brown
Hearing Officer
Office of Hearings and Appeals

Date: October 7, 2003